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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 726

FRED CODUTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION OF PETITIONER TO STRIKE PORTION OF BRIEF FOR THE UNITED STATES IN OPPOSITION

AND

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Now comes FRED CODUTO, Petitioner herein, by Charles A. Bellows, his attorney, and respectfully moves the Court to strike the portion of the Brief for the United States in Opposition, to wit: the first phrase of the sentence commencing on page 5 of said Brief, line 16, as follows:

> Although the evidence at the trial did not purport to indicate the full extent of petitioner's narcotics traffic, • • •.

For the reason that said phrase is not supported by the evidence contained in the record in this case and is scandalous.

CHARLES A. BELLOWS
Chicago, Illinois
Attorney for Petitioner

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1. The Government's answer to the petitioner's first point concerning the production of the minutes of the grand jury for the purpose of impeachment, is based upon two premises, neither of which are supported by the prevailing case law. The first premise is that "petitioner pointed to nothing in McNeal's testimony which would have indicated to the trial judge that McNeal's testimony before the grand jury was different from his later testimony at the trial." The leading case on the question of the production of grand jury minutes, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, specifically states that:

> • • • Petitioners indicate that the trial judge required a showing of contradiction between [the witness] Jonas' trial and grand jury testimony. Such a preliminary showing would not, of course, be necessary. (360 U.S. 395, 400-401)

The manifest unfairness of the Government's position is at once obvious. The Government is in effect saying: "We will not show you the minutes, but tell us where they are inconsistent with the trial testimony of the witness." This position would require the defendant or his counsel to be gifted with extrasensory perception.

The second premise upon which the Government's objection is based is that the petitioner made no specific request that the trial judge inspect the minutes of the grand jury in camera. In support of this premise, it again cites the *Pittsburgh Plate Glass Co.* case. There is no such holding in that case. There the petitioners asserted an absolute right to have access to the grand jury minutes, and upon that narrow question the Court held that there was no such absolute right, saying: (360 U.S. 395, 401)

> • • • The short of it is that in the present case the petitioners did not invoke the discretion of the trial judge, but asserted a supposed absolute right, a right which we hold they did not have.

In the present case the motion of the petitioner for access to the grand jury minutes of the witness was addressed to the discretion of the trial court. The questions which we now present are whether the trial court may summarily deny such a motion or must it first inspect the minutes, and must the petitioner specifically request that the trial court inspect the minutes. We know of no case which holds that such a request for inspection must be made. *Pittsburgh Plate Glass Co.* does not, nor has the Government cited anything but some dicta in that case in support of the proposition. In fact, the Second Circuit, the Circuit in which most of the cases concerning this problem have arisen, apparently makes no distinction between an outright

request for access to the grand jury minutes and a request that the trial court inspect the minutes in camera. In that Circuit the rule is seemingly that no matter what the form of the request is, the duty devolves upon the trial court to inspect minutes of the grand jury for the purpose of discovering impeaching matter. See, *e.g. United States* v. *Spanglet*, 258 F. 2d 338; *United States* v. *H. J. K. Theatre Corporation*, 236 F. 2d 502. Although this is not a brief on the merits of the case, it must be urged that the rule of the Second Circuit ought to be established for all circuits, lest Federal jurisprudence in this area degenerate into a form of sorcery in which the magic words must be uttered in the proper manner or else the defendant's right shall be denied.

The Government states that a particularized need is necessary for the production of the grand jury minutes. The purpose for the motion of the petitioner in the trial court was to obtain impeaching material for use in cross examining the witness. This was apparently understood by all participants in the trial. This matter is fully set forth in our petition and does not require reiteration here. (Pet. 7-8) The use of the grand jury minutes for impeachment constitutes the particularized need and this Court recognized this fact in its initial discussion on the problem. In *United States* v. *Procter & Gamble Company*, 356 U.S. 677, 683, this Court said:

> • • • We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. *Those are cases of particularized need* where the secrecy of the proceedings is lifted discretely and limitedly. (Emphasis added)

Hence the use of the grand jury minutes for impeachment is of itself the particularized need required by this Court.

2. In answer to our second point that it was the duty of the trial court to make an inquiry to determine whether or not the jury had knowledge of certain prejudicial articles appearing in the newspapers, the Government has replied that the articles were not prejudicial. The articles in question called the petitioner a "key figure in the narcotics traffic" and contained a statement of the chief investigator for the Cook County, Illinois, State's Attorney, that the petitioner was "Mr. Big in local narcotics" and that the investigator called the petitioner's "dope trade a million dollar a year business."

There was no such evidence introduced. The Government, mounting inference upon inference, would have this Court believe that because the evidence showed that the petitioner dealt in $4700 worth of narcotics with one person in ten days his sales for one year would amount to one million dollars. Aside from the fact that the Government's arithmetic is faulty, there was no evidence introduced at any time, either in the Government's case before the jury, or in aggravation, that the petitioner was ever connected with narcotics sales other than those charged in the indictment. The statement in the Government's Brief in Opposition that the "evidence at the trial did not purport to indicate the full extent of the petitioner's narcotic traffic" (Br. in Opp. 5) has absolutely no basis in the record of this case, is scandalous and ought to be stricken; and we have herewith filed a motion asking for that relief. The Government has been as influenced by the content of the newspaper articles as the jury could have been and as the trial judge was when he sentenced the petitioner, saying that the petitioner was a "wholesale supplier" of heroin. (Pet. App. I, p. 31)

The material contained in the articles being of such a prejudicial nature, the trial court should not have summarily overruled petitioner's motion for a mistrial. The Government has not answered our brief on this point and we therefore shall only refer the Court to our brief which contains all our arguments on the matter.

3. & 4. To answer the Government's brief on points 3 and 4 would require that we set out all the arguments contained in our petition. Therefore we shall not presume upon the Court to do so. However two observations must be made.

The Government contends in opposition to point 3 that petitioner did not raise a proper objection to the instructions complained of. The record shows that a conference was held among the judge and the attorneys for all parties for the purpose of settling the instructions. At that time, which was before the jury retired to consider its verdict, counsel for the petitioner was given the instructions which the court proposed to give. He made his objections and requested that certain instructions be given. The court refused. The matter was assigned on appeal. The Government raised the same point as here that the objection should have been made after the jury was instructed. There is no such requirement in Rule 30 of the Rules of Criminal Procedure. The rule merely requires that the objection to the charge be made "before the jury retires to consider its verdict." The objection was made before the jury retired. The Court of Appeals apparently thought so little of the contention which the Government now makes that it ignored it completely.

The second observation which concerns point 4 is that this Court has reviewed sentences imposed in lower federal courts and has reversed where the sentence has been found excessive. *Yates* v. *United States*, 356 U.S. 363.

Respectfully submitted,

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